

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MRS. JUSTICE K.HEMA

TUESDAY, THE 26TH SEPTEMBER 2006 / 4TH ASWINA 1928

CRL.A.No.1040 of 2002

SC.437/1999 of ADDL.SESIONS COURT (ADHOC-I), KASARAGOD

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APPELLANT/ACCUSED:

A.AITHAPPA, S/O. BAIRA, AGED 32 YEARS,
AMAY COLONY, KASARAGOD.

BY MR.M.SASINDRAN, ADVOCATE.
MR.M.B.PRAJITH, ADVOCATE.

RESPONDENT/RESPONDENT:

STATE - REPRESENTED BY THE PUBLIC
PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM.

BY MR. K.A. AKBAR, PUBLIC PROSECUTOR.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD
ON 26/09/2006, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

CRL.A.No.1040/2002

Order on Crl.M.P.No.8162/2002 in CRL.A.No.1040/2002

Dismissed.

26.09.2006

Sd/- K. HEMA, JUDGE.

// True Copy //

P.A. to Judge.

smp

K. HEMA, J.

Crl.Appeal No.1040 OF 2002

Dated this the 26th day of September, 2006.

J U D G M E N T

Accused challenges the conviction and sentence passed against him under Section 55(a) of Abkari Act to undergo rigorous imprisonment for three years and to pay a fine of Rs.1 lakh and in default, to undergo rigorous imprisonment for one year.

2. According to prosecution, the appellant was found in possession of 4 litres of country made illicit arrack on 03.07.1999 at about 6.45p.m on a road going to Amay colony. PW1, the detecting officer, was on patrol duty along with PW3, the police constable. When they got reliable information about the commission of offence and on reaching the place of occurrence, they found the accused carrying a can, M.O.1. The accused attempted to run away, but he was apprehended and on examination the can was found to contain 4 litres of arrack.

3. Accused was arrested at 7.00p.m. Sample was drawn in two bottles having a capacity of 375ml. each. Sample was sealed and labeled, and the articles and material objects were taken into custody under a seizure mahazar Exhibit P2. M.O.1 is the alleged can seized

from the possession of the accused. PW3 is the police constable who attested the seizure mahazar Exhibit P2. F.I.R was registered on the same day as Exhibit P1. Investigation was completed, sample was sent for chemical analysis and it was found to contain ethyl alcohol and charge sheet was laid against the accused.

4. To prove the case, prosecution examined PWs 1 to 5, marked Exhibits P1 to P5 and M.O.1. The accused did not adduce any evidence. The court below, after analyzing the evidence, found that the prosecution proved the case against the accused. It was held that the evidence of PW1, the Sub Inspector, was corroborated the evidence of PW3, the police constable regarding arrest and seizure in all material particulars and that there was no discrepancy or contradiction in their evidence. This was the basis on which the conviction was laid.

5. On going through the evidence in this case, I find that the said findings cannot be upheld. PW3 is not corroborated PW1 on material aspect regarding the seizure of the material objects from the possession of the accused. PW1 deposed that the accused was found carrying a can containing 4 litres of arrack and M.O.1 was seized from his possession. PW3, however, stated that the accused was found carrying a can containing arrack and he attempted to run away and on

examination, the can contained 4 litres of arrack on smell and taste. He did not speak anything regarding the seizure of M.O.1 from the possession of the accused.

6. PW3 is totally silent in the chief examination and nothing is brought out from his evidence even in the re-examination that M.O.1 was seized from the possession of accused. He also did not even say that Exhibit P2 seizure mahazar was prepared for the seizure in respect of M.O.1. He only said that he signed Exhibit P2 seizure mahazar, but did not state that seizure was effected as stated in Exhibit P2 or as stated by PW1. Thus, there is no corroboration on the material aspect in this case, which is the seizure of M.O.1 from the possession of the accused. So, the finding that PW3 corroborated PW1 on material particulars is not correct. The main and the most important aspect in a case involving offence under Section 55(a) of Abkari Act is the seizure of the material object from the possession of the accused. But, PW3 is totally silent about the same in his evidence.

7. It cannot be said that it is a mere insignificant or inadvertent omission made by PW3. The prosecution has not taken any pain to bring out the material aspect from the evidence. It can also be seen that the can M.O.1 which is produced in the court did not contain any identifying mark to connect the same with the accused. PW1 did not

say, in the chief examination, that M.O.1 was sealed or that any label was affixed on it. However, in the cross examination, it was brought out that there was a label on the can and it contained the name and signature of the accused. But, such a label was not present at the time of evidence and there is no explanation for the same. Thus, it cannot be positively held that M.O.1 is the can which was seized from the possession of the accused on the date of occurrence. Prosecution has not proved this aspect satisfactorily. In the above circumstances, I hold that the prosecution has not proved that the accused was found in possession of M.O.1 which was produced in the court. The court cannot make conclusions on conjectures.

The conviction and sentence passed against the appellant are therefore, set aside. The accused is found not guilty of offence under Section 55(a) of Abkari Act. He is acquitted of the said offence. He is set at liberty forthwith.

This appeal is allowed.

K. HEMA, JUDGE

smp